

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN DOE,	:	
Plaintiff,	:	
	:	
-vs-	:	Civil No. 3:01cv519 (PCD)
	:	
RONALD BARRETT, <i>et al.</i> ,	:	
Defendant.	:	

RULINGS ON DEFENDANT’S MOTION TO DISMISS AND
ON PLAINTIFF’S MOTION FOR SANCTIONS

Defendant Ronald Barrett moves to dismiss the complaint of plaintiff John Doe pursuant to FED. R. CIV. P. 12(b)(1) and (6). Plaintiff moves for sanctions against defendant and his attorney pursuant to FED. R. CIV. P. 11 for alleged misrepresentations in plaintiff’s motion to set aside default. For the reasons set forth herein, the motion to dismiss is granted and the motion for sanctions is denied.

I. BACKGROUND

Plaintiff is an inmate of the Connecticut Department of Correction. He alleges that defendant,¹ a male prison health worker, sexually harassed and assaulted him. Defendant then threatened that he would retaliate if plaintiff complained of the conduct. As a result, plaintiff did seek redress through the Connecticut Department of Correction grievance system before filing the present complaint alleging violation of 42 U.S.C. § 1983, assault and battery, intentional infliction of emotional distress, and false imprisonment.

¹ On August 20, 2001, the claims against all other defendants were dismissed.

II. MOTION TO DISMISS

Defendant moves to dismiss the 42 U.S.C. § 1983 claim arguing that plaintiff's failure to exhaust administrative remedies under the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(a), denies this Court subject matter jurisdiction. Plaintiff responds that exhaustion of remedies is not required for claims involving sexual assault and threats of retaliation.

A. Standard

A motion to dismiss is properly granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001) (internal quotation marks omitted). A motion to dismiss must be decided on the facts as alleged in the complaint. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 186 (2d Cir. 2001). All allegations are assumed to be true and are considered in the light most favorable to the non-movant. *Manning v. Utilities Mut. Ins. Co., Inc.*, 254 F.3d 387, 390 n.1 (2d Cir. 2001). As a plaintiff proceeding pro se, the pleadings shall be liberally construed to raise the strongest argument suggested. *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996)

B. Analysis

Plaintiff concedes that he failed to exhaust administrative remedies but argues that dismissal of his 42 U.S.C. § 1983 claim is not warranted under the circumstances of his case. In most cases, there is no requirement that a plaintiff exhaust administrative remedies before pursuing a claim under 42 U.S.C. § 1983. *See Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982). However the PLRA, pursuant to 42 U.S.C. § 1997e(a), departs from this general

rule by requiring that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner . . . until such administrative remedies as are available are exhausted.” It was held in *Nussle v. Willette*, 224 F.3d 95, 100 (2d Cir. 2000), which involved a claim of assault and a subsequent threat of retaliation, that “§ 1997e(a) does not encompass particular instances of excessive force or assault.” The Supreme Court, however, has since reversed *Nussle*, holding that “§1997e(a)’s exhaustion requirement applies to all prisoners seeking redress for prison circumstances or occurrences.” *Porter v. Nussle*, No. 00-853, 2002 WL 261683, at *3 (Feb. 26, 2002). *Porter* thus forecloses review of plaintiff’s § 1983 claim. The claim is dismissed.

The dismissal of plaintiff’s federal claim renders imprudent an assertion of jurisdiction over plaintiff’s state law claims in the absence of diversity of citizenship. *See K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 131 (2d Cir. 1995). The remaining state law claims are therefore dismissed.

III. MOTION FOR SANCTIONS

Plaintiff moves pursuant to FED. R. CIV. P. 11 for sanctions against defendant and his counsel for misrepresentations associated with the filing of a motion to set aside default.

A. Background

On August 6, 2001, default entered against defendant and a hearing to determine damages was scheduled for September 10, 2001. On the day of the hearing, Attorney Peter Berry appeared on behalf of defendant and moved to set aside the default arguing that defendant failed to defend because he believed that M. Hatcher Norris, his attorney for related criminal proceedings, represented him in the related civil proceedings. Defendant’s motion to set aside the default was granted.

In support of his motion for sanctions, plaintiff provides details as to the relationship between defendant and Attorney Norris. Attorney Norris received a \$10,000 retainer for representation in the criminal matter and informed defendant several times that he was not his attorney for the civil proceedings. Notwithstanding Attorney Norris's attempt to convince defendant otherwise, defendant forwarded documents served upon him in the civil case to Attorney Norris. Attorney Norris also contacted plaintiff and requested that plaintiff not seek a default judgment while defendant was incarcerated and was copied on correspondence between the Office of the Attorney General for the State of Connecticut and defendant in which the State declined to represent him in the present case.

B. Analysis

Plaintiff argues that defendant's misstatements in his motion to set aside default as to his relationship with Attorney Norris and Attorney Berry's certification without inquiring into those misstatements justify sanctions. Defendant responds that the motion to set aside default did not contain misstatements.

In the motion to set aside default, defendant argued that the motion should be granted because he "*believed* that he was being represented . . . by Attorney M. Hatcher Norris." (Emphasis added). The motion therefore alleged that defendant honestly believed he was represented. Defendant never alleged that the belief was reasonable, alleging only his mistaken belief that Attorney Norris represented him and reliance thereon as his basis for not responding to plaintiff's complaint.

Sanctions against a party and/or his attorney are appropriate when it appears that a pleading has been interposed for an improper purpose or that a competent attorney could not reasonably believe that the pleading was grounded in fact after a reasonable inquiry. *Healey v. Chelsea Resources, Ltd.*,

947 F.2d 611, 622 (2d Cir. 1991). The ongoing nature of the relationship with defendant and Attorney Norris supports defendant's assertion in his motion to set aside the default that he believed, albeit mistakenly and unreasonably, that he was represented by Attorney Norris. Under the circumstances, defendant's attorney was not obligated to contact Attorney Norris and assess whether defendant's belief was ultimately reasonable as it was never alleged that defendant's belief was reasonable.² The motion for sanctions is denied.

IV. CONCLUSION

Defendant's motions to dismiss (Doc. 43) is **granted**. Plaintiff's motion for sanctions (Doc. 48) is **denied**. Plaintiff is granted leave to file an amended complaint within thirty days.

SO ORDERED.

Dated at New Haven, Connecticut, March ___, 2002.

Peter C. Dorsey
United States District Judge

² At the hearing on Monday, September 10, 2001, Attorney Berry stated that he met with defendant for the first time for two hours on the previous Friday and filed the motion before the 10:00 hearing. Under the circumstances, it would be difficult to find his inquiry unreasonable. *See Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1330 (2d Cir. 1995).